No. 96-1382

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CHARLES F. CONNELL and JULIA K. CONNELL, husband and wife, and JULIA K. CONNELL, individually as successor-in-interest; VIRGINIA DULLANTY, PATRICIA SCHULLER, each as their separate property,

Petitioners,

vs.

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife,

Respondents,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below erred by ordering the reinstatement of a lease on equitable powers which had expired by operation of Washington State law?

2. Whether the court below erred when it failed to exercise its authority to certify this Washington State legal question of first impression to the Washington State Supreme Court for final determination pursuant to Washington State Rules on Appeal RAP 16.1 and 16.16?

3. Whether the court below erred in holding that the Trial Court, in granting a tenant "equitable reinstatement" of an expired lease, could not also do equity to the landlord by adjusting the rent to fair market value?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Petitioners are JULIA K. CONNELL, VIRGINIA DULLANTY and PATRICIA SCHULLER. Frank Conklin and Richard C. Dullanty, Jr. are counsel of record for Petitioners.

The Respondents are correctly identified in the caption. Joseph P. Delay of **DELAY, CURRAN, THOMPSON & PONTAROLO, P.S.** is counsel of record for respondents HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife. Walter Dellinger of the U.S. Department of Justice, Office of the Solicitor General, is counsel of record for the respondent UNITED STATES POSTAL SERVICE.

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Rules Cited:

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Other Authority Cited:

17 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4248 (1978) 2

STATEMENT OF THE CASE

On October 6, 1970, Charles F. Connell and Julia K. Connell, husband and wife, Petitioners ("Petitioners") entered into an assignable ground lease and leased to the United States Postal Service, Respondents (hereafter Postal Service), property in Spokane County, Washington. On May 24, 1971, the Postal Service assigned the ground lease to Harlan D. Douglass and Maxine H. Douglass, Respondents ("Douglass"). Subsequently, Respondents Douglass and the Postal Service entered into a building lease (lease back) for a building built upon the above-referenced property under a lease dated January 22, 1973. The initial term of the building lease was for 15 years with five options of five years each. The first renewal period for the assignable ground lease began January 1, 1988 for the period ending December 31, 1992, and was properly exercised. Notice of exercise of the second renewal period was due by November 1, 1992. The court found no evidence of delivery or even mailing of Douglass' September 4, 1991 letter wherein an attempt was made to renew the lease as required by the lease. The trial court held that Respondents Douglass had failed to renew the assignable ground lease and that the assignable ground lease had therefore expired on December 31, 1992. A forfeiture of the assignable ground lease would title the premises, all building structures and improvements in the owner, Petitioners, per the language of the assignable ground lease. In May 1993, Petitioners notified Respondents Douglass the lease had expired. The court concluded that an inequitable forfeiture would result if equity does not intervene, because valuable, permanent improvements were made to the property by Respondents Douglass. Respondents Douglass constructed on said ground leased property a building costing $360,000 and, in 1980, spent $111,930 in repair work. A forfeiture would cost Respondents Douglass their initial improvements and their investment of $111,930 plus a possible $243,850 in interest (Conclusions of Law, pps. 19 and 20).

REASONS FOR DENYING THE WRIT

This Court should not grant the petition for a writ of certiorari because: (1) the question Petitioners seek to certify with the Washington Supreme Court is not uncertain in Washington; (2) the Ninth Circuit correctly held that the District Court erred by raising the ground rent payments to the Petitioners; and (3) this case lacks the necessary compelling reasons for this Court to grant the petition.

I.

WELL SETTLED WASHINGTON LAW WAS USED BY THE COURTS BELOW TO PROPERLY DECIDE THIS CASE.

Certified questions should be confined to uncertain questions of state law. *See* 17 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4248, pp. 529-530 (1978). This case is not one of first impression in Washington nor does the case present an uncertain question of state law.

Petitioners' brief incorrectly states that "there is no state court precedent." Petitioners' brief fails to mention the Washington case which establishes precedent and decides the matter. Because of the factual similarities involved, the District Court and the Ninth Circuit used the precedent and law set forth in *Wharf Restaurant, Inc. v. Port of Seattle*, 605 P.2d 334 (Wash. App. 1979) to correctly decide the case at bar. This Court should not grant the petition because the question at issue is not uncertain. That issue was decided in *Wharf*.

The Ninth Circuit, reviewing for abuse of discretion, relied on *Wharf* in finding that the District Court properly used its equitable powers to reinstate the ground lease. The Ninth Circuit

found that the District Court erred by raising the ground rent payments to the Petitioners. *See Douglass v. Connell*, mem. op. (9th Cir. 1996).

The general rule in Washington is that if an option is not exercised in a timely manner then it will be lost. *Heckman Motors, Inc. v. Gunn*, 73 Wash. App. 84, 88, 867 P.2d 683, 685 (1994). Petitioners' brief to this Court fails to note the recognized exception to the general rule. *Wharf* provides an exception to the general rule. *Wharf*, 695 P.2d at 340-41. The District Court found that the exception applied to Respondents Douglass, and the Ninth Circuit affirmed.

The *Wharf* decision allowed a tenant to renew its option on a lease agreement after the time for renewal expired. The court in *Wharf* articulated a set of special circumstances that helped indicate when delayed exercise of an option may be appropriate. In formulating these special circumstances, the court relied on Professor Corbin's TREATISE ON THE LAW OF CONTRACTS. In *Wharf*, the court outlined five conditions precedent to renewing an expired option:

> (a) the failure to give notice was purely inadvertent; (b) an inequitable forfeiture would result if equity did not step in; (c) the lessor did not detrimentally change its position because of the late exercise of the option; (d) the lease was for a long-term; and (e) there was no undue delay in giving notice to the lessor.

Wharf, 605 P.2d at 341.

The Ninth Circuit determined that the District Court did not abuse its discretion by concluding that the above "special

circumstances," when taken together, justify granting specific performance of the expired lease. *See Douglass v. Connell*, mem. op. (9th Cir. 1996). The Ninth Circuit concluded that the *Wharf* factors supported the District Court's decision to renew the lease. *Id.*

The law in Washington regarding options to extend or renew leases is clear. In reaching the correct decision, the Ninth Circuit properly identified and applied well settled Washington law to the facts of this case. Because the law in Washington is directly on point and the Ninth Circuit found that the District Court did not abuse its discretion in relying on the exception to the general rule as enunciated in *Wharf*, this Court should deny the petition, should not take jurisdiction of this cause and should not order the Courts below to certify this cause to the Supreme Court of Washington.

II.

THE NINTH CIRCUIT CORRECTLY FOUND THAT THE DISTRICT COURT ERRED BY RAISING THE GROUND RENT PAYABLE TO THE CONNELLS.

There is no precedent in the state of Washington for the use of equitable powers to increase the rent amount in a lease as was done in this case. Use of equity to change an express contractual term is limited to cases of mistake, accident, fraud, unclean hands, or protection of a bona fide purchaser for value. *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893); *Miller v. Pac. 1st Fed'l*, 86 Wash. 2d 401, 406, 545 P.2d 546, 549 (1976). In these proceedings there was no mistake, accident, fraud, unclean hands or a bona fide purchaser. There was a Conclusion of Law by the District Court that there was no mistake, accident, fraud, unclean hands nor a bona fide purchaser in these proceedings (Conclusions of Law, p. 24).

Therefore, absent a finding of fraud, accident or mistake, there is no legal authority for the trial court to increase the rent amount under the assignable ground lease *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893).

In this case, the rent amount in the assignable ground lease was mutually bargained for and agreed upon by both parties. Petitioners were represented by the same attorney in the lease negotiations that represents them in these proceedings. There was no over reaching; the term for the amount of rent is not unconscionable; and the transaction was at arms length.

Changing the rent amount in the assignable ground lease was beyond the scope of the court's equitable powers and there is abundant authority supporting this fact. Contracts are not to be changed or remade by a court except under the narrow circumstances such as fraud, accident or mistake. *Hedges v. Dixon County*, 150 U.S. 182, 189 (1893); *Anderson v. Ferguson*, 17 Wash. 2d 262, 275, 135 P.2d 302 (1943).

Changing the rent amount of the lease fits no known exception of construction nor any equitable principal. The courts, under the guise of construing or interpreting a contract, should not make another or different contract for the parties. *Poggi v. Tool Research and Eng'g Corp.*, 75 Wash. 2d 356, 364, 451 P.2d 296, 300-01 (1969); *Fancher Cattle v. Cascade Packing*, 26 Wash. App. 407, 409, 613 P.2d 178, 179 (1980).

The Ninth Circuit's Memorandum Opinion noted that the *Wharf* court did not alter the rent when it reinstated the lease. Additionally, the Ninth Circuit did not find any precedent in Washington for doing so.

For the above reasons, the Ninth Circuit correctly reversed the District Court on the issue of increasing the ground rent

payment. This court need not disturb the Ninth Circuit's well reasoned and researched decision.

III.

THIS CASE LACKS COMPELLING REASONS FOR THIS COURT TO GRANT THE PETITION.

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Petitioners in this case have not substantiated their claims that compelling reasons exist for this Court to grant the petition.

Petitioners' claim that relieving the burden on the Federal Court is a compelling reason for this Court to hear argument on the issues. This line of argument is unpersuasive and not compelling in the case at bar. Here, the issues of state law are not uncertain. As such, Petitioners have not formulated any compelling reasons why this Court should grant the petition.

Supreme Court Rule 10 also provides that "[a] petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Petitioners argue that the Ninth Circuit misapplied rules of equity when deciding the case. This argument is misplaced, as shown above, and certainly not compelling enough for this Court to grant the petition.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

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